UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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In re: Case No. 01-12543

Ismail Orul,

Debtor. Chapter 7

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American Express Centurion Bank,
Optima Account, Adv. Pro. No. 01-90208

Plaintiff,

-vs-

Ismail Orul,

Defendant.

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Appearances:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

**Memorandum, Decision & Order**

Before the court is an adversary proceeding filed by American Express Centurion Bank ("Plaintiff), seeking a nondischargeability determination for a debt owed to it by the Debtor, Ismail Orul ("Defendant"). The Plaintiff relies upon 11 U.S.C. § 523(a)(2)(A) and the court has core jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A) and (I) and 1334(b).

## Facts

The facts are simple and based upon the pleadings and the documents and testimony presented at the evidentiary hearing, the court finds the following:

In September 1996, the Plaintiff extended credit privileges to the Defendant. In November 2000, the Defendant lost his job of 11 years; he had earned between $33,000 - $36,000 annually, excluding overtime. On January 6, 2001, the Defendant's account had a zero balance. Between January 7, 2001 and March 12, 2001, the Defendant charged $13,083.02[1] on this account. During this time the Defendant made one payment of $150.00, the minimum amount due. Other credits, for returned merchandise, were also applied to the account resulting in a balance of $11,093.66.

On April 18, 2001, the Defendant filed a voluntary Chapter 7 petition. The Plaintiff was properly listed and notified of the proceedings and timely filed the present adversary proceeding.

## Argument

The Plaintiff argues that the evidence establishes its cause of action under 11 U.S.C. § 523(a)(2)(A) and that a judgment on its behalf is warranted. Not surprisingly, the Defendant disagrees. He contends that the Plaintiff did not prove that he made any false representations or that he had the requisite intent to deceive.

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[1]These charges include: January 7, 2001 - $4,867.18 for "fine jewelry" at Sterns, this charge was reduced by a $887.81 credit; January 8, 2001 - $270.61 at Circuit City; January 9, 2001 - $865.99 at Sears Roebuck; January 12, 2001 - $1,002.00 cash withdrawal; February 9, 2001 - $425.00 to Valley View Apartments; February 9, 2001 - $528.00 to Progressive; February 12, 2001 - $202.00 cash withdrawal; February 22, 2001 - $1,187.00 to New York State Income Tax; March 8, 2001 - $425.00 to Valley View Apartments; March 14, 2001 - $2,000.00 to himself; and various nominal charges.

**Discussion**

The Second Circuit has not yet interpreted 11 U.S.C. § 523(a)(2)(A) in a credit card context. However, most courts addressing the issue have concluded that to be successful, a party must demonstrate, by a preponderance of the evidence, that:

1. the debtor made a representation;
2. knowing it was false;
3. with the intent to deceive the creditor;
4. upon which the creditor actually and justifiably relied; and
5. that the creditor sustained a loss as the proximate result of its reliance upon the statement. *In re Jarczyk*, 268 B.R. 17 (W.D.N.Y. 2001) (citations omitted).

The only issues in dispute are whether the Defendant made a false representation with an intent to deceive. There is no argument that the Plaintiff actually and justifiably relied on any representation and that reliance was the proximate cause of its damages. Therefore, the court will confine its discussion to the elements in contention.

I. False Representation with Intent to Deceive - Implied Representation Doctrine vs. Assumption of Risk Doctrine

This court has not previously addressed the implied representation or assumption of the risk doctrines, therefore, a brief discussion is warranted. Courts have recognized the difficulty credit card plaintiffs have in attempting to establish the traditional elements of fraud, and in an effort to fashion a practical solution, two competing theories have emerged. A minority of courts follow the "assumption of risk doctrine" where the card issuer assumes all risks until the use of the card is revoked and the notice of revocation is received by the cardholder. *See In re Roddenberry*, 701 F.2d 927 (11th Cir. 1983). On the other hand, a majority of courts utilize the "implied representation doctrine" or a modified version of it, which holds that every time a credit

card is used the cardholder implicitly represents, to the issuer of the card, that he intends[2] to repay the debt. *In re Jarczyk*, 268 B.R. 17, 21 (W.D.N.Y. 2001). This court finds the "implied representation doctrine" persuasive, joins the majority by adopting it, and determines the Defendant implicitly represented his intention to repay the debt each time he used the card.

Finding that there was an implied representation leads to the further questions of whether the Defendant knew the representation was false and whether he harbored the requisite intent to deceive. Because of the difficulty in proving a debtor made a knowingly false statement with an intent to defraud courts have looked at various factors, including:

1. The length of time between the charges made and the filing of the bankruptcy;

2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

3. The number of charges made:

4. The amount of charges made;

5. The financial condition of the debtor at the time the charges were made;

6. Whether the charges were above the credit limit of the account;

7. Whether the debtor made multiple charges on the same day;

8. Whether or not the debtor was employed;

9. The debtor's prospects for employment;

10. The debtor's financial sophistication;

11. Whether there was a sudden change in the debtor's buying habits; and

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[2]Finding a representation of an intent to repay does not equate to a finding there was a representation of an ability to repay. *In re Truong,* 271 B.R. 738 (Bankr. Conn. 2002); *In re Parkhurst*, 202 B.R. 816 (Bankr. N.D.N.Y. 1996).

12. Whether the purchases were made for luxuries or necessities.

In this case, the Defendant was unemployed and thus, his financial condition was tenuous, at best, when many of the charges were made. (Tr. 26, 35-36.) He refused a job offer because it paid less than $35,000.00 annually, greatly reducing his prospects for employment. (Tr. 41.) There are multiple charges on the same day and certain charges are excessive.[3] Moreover, in two months the Defendant charged $11,093.66 on an account where he had maintained a zero balance, indicating a sudden and drastic increase in the Defendant's charging habits. Finally, all of the charges were incurred within three months of the filing of the petition.

The Defendant testified he intended to repay the Plaintiff. However, he also asserted that he sold the $5,000 worth of jewelry to meet his daily living expense, receiving $1,500.00 and that he hoped to win money gambling to repay the debt. (Tr. 33, 46-48.) It has been pointed out, and this court agrees, an "[i]ntent to repay [the debt at issue] requires some factual underpinnings which lead a person to a degree of certainty that he or she would have the ability to repay. Mere hope, or unrealistic or speculative sources of income are insufficient." *In re Melancon*, 223 B.R. 300, 337 (Bankr. M.D. La. 1998). In light of the objective undisputed facts, the Defendant's professed desire to repay the debt has no plausible factual basis and is insufficient to overcome the substantive evidence.

**Conclusion**

When the Defendant's unconvincing testimony is viewed in conjunction with the totality

[3]E.g., January 7, 2001 - $4,867.18 for "fine jewelry" at Sterns, this charge was reduced by a $887.81 credit, January 9, 2001 - $865.99 at Sears Roebuck; January 12, 2001 - $1,002.00 cash withdrawal; and March 14, 2001 - $2,000.00 to himself.

of the objective facts, the inescapable result is a determination that the Defendant knew the representation that he intended to repay the debt was false and that he harbored the requisite fraudulent intent. For all of these reasons, the court concludes the debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge